United Nations AT/DEC/1161

Administrative Tribunal

Distr.: Limited
30 January 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1161

Case No. 1204: DONGOL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Shyam Bahadur Dongol, a staff member of the United Nations Population Fund (hereinafter UNFPA), the President of the Tribunal, with the agreement of the Respondent, granted extensions of the time limit for filing an application with the Tribunal until 31 May 2001 and thereafter until 30 September 2001;

Whereas, on 29 June 2001, the Applicant filed an Application, requesting the Tribunal, inter alia:

"5. ...

(3) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for denial of due process;

(4) to order that the Applicant be reinstated as G7, Step XI immediately and that he be retroactively paid the difference between the G6 and G7 salary for the period that he was demoted;

(5) to award the Applicant additional compensation, to be determined by the Administrative Tribunal, for the damage caused to the Applicant's reputation;

(6) to find that the acceptance of the [ad hoc Disciplinary Committee (AHDC)] recommendation by the [United Nations Development Programme (UNDP)] would cause the Applicant to receive a smaller pension than he would otherwise have received;

(7) to order as remedy to the inequity of his Pension that; the Administration should reinstate his Pension Fund contribution at GS7 level and pay the difference between G-6 and G-7 level for both the Applicant's monthly contribution and the Administration's contribution to [the United Nations Joint Staff Pension Fund] for the period the Applicant was demoted".

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 30 November 2002;

Whereas the Respondent filed his Answer on 22 November 2002;

Whereas on 25 July 2003 the Tribunal decided to postpone consideration of this case until its autumn session;

Whereas the facts are as follows:

The Applicant entered the service of UNFPA on a fixed-term three month contract at the GS 4 level as an Office Assistant, in Kathmandu, Nepal Country Office, on 7 May 1975. After a number of extensions and promotions, the Applicant's contract was converted to permanent. At the time of the events which gave rise to this Application, the Applicant held the post of Senior Administrative and Finance Assistant at the G-7 level, Nepal Country Office.

On 8 October 1999, the Applicant along with four other members of the Procurement Committee, wrote to the Chief, Office of Oversight and Evaluation, UNFPA Headquarters, informing him of alleged irregularities and violation of procurement rules and procedures at the Country Office. Blaming the UNFPA Representative, they maintained they had been coerced by him into compliance with the improprieties and requested an investigation.

In response to their request, the Office of Audit and Performance Review (OAPR), UNDP, constituted a special audit team on 10 November 1999, "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal.

The report of the OAPR special audit team concluded that there was evidence of unsatisfactory conduct on the part of the Applicant, and recommended disciplinary action. The report concluded that he had signed minutes of meetings of the

Procurement Committee which had not been held and had failed to exercise his oversight and supervisory authority over his subordinates, which had resulted in "major financial and procurement irregularities". The Applicant was provided with a copy of the report on 18 February 2000 and asked to provide his comments by 6 March. The Applicant responded on 28 February, stating that he had only signed the minutes under pressure from the Representative. Insofar as his supervisory functions were concerned, the Applicant argued that the Representative had prevented him from effective supervision of his fellow employees.

On 28 June 2000, the UNFPA Representative, *a. i.*, advised the Applicant that he was being suspended from duty with pay, with immediate effect. He was further informed that certain audiotaped conversations involving the Applicant and other staff members from his office as well as a statement that he had collected bribes, were considered to have established *prima facie* evidence of serious misconduct on his part, and corroborate his participation in a bribery scheme, as well as in other violations of the most basic standards of conduct, financial rules and procedures. The Applicant was advised that these allegations were in addition to those with which he had already been charged but that no decision would be taken on any of the charges until his full comments were received. He was given until 18 July to respond. On 14 July, the Applicant responded, denying the charges and insofar as the audiotape was concerned, pointed out that the 28 June letter referred to discussions to which he was not a party. He also denied collecting any commission from any company during his entire career with UNFPA.

The Officer-in-Charge of UNDP responded on 15 August 2000, stating, inter alia,

> "After a thorough review of your explanations on the allegation of 28 June 2000 that you were actively involved in bribery schemes, and in the absence of corroboration of the [Assistant Representative's] accusation against you, it has been decided to grant you the benefit of the doubt and to withdraw these bribery charges.
>
> On the other charges of 18 February 2000, after a complete review of your explanations and of all the evidence on record, we are unable to accept the reasons you have given for signing minutes of contracts committee meetings which did not take place, for your failure to ensure compliance with procurement rules and for your shortcomings in the supervision of your staff involved in procurement. Considering your position as a senior UNFPA official in Nepal, your sub-standard performance in these procurement activities has reached the dimension of gross negligence and it constitutes a breach of the fiduciary obligations entrusted to you by UNFPA in the management of its assets and properties. We have also noted that losses

> suffered by UNFPA in the administration of construction contracts, which in most cases were awarded well above market prices, would have been avoided if you had exercised adequate control and monitoring over your staff. The documentation on record also indicates that you signed documents related to irregular bids received from construction firms.
>
> In view of your unsatisfactory conduct and after consulting the Executive Director of UNFPA, it has been decided that continuation of your services would not serve the best interest of the Organization. Consequently, effective on the date of receipt of this letter, and in accordance with Staff Rule 110.3(a)(vii) you will be separated from service without notice or compensation in lieu thereof, notwithstanding Staff Rule 109.3.

On 27 August 2000, articles appeared in the local Kathmandu press attributed to a UNFPA source, referring to an investigation which had uncovered irregularities and improprieties in procurement and awarding of contracts in the Nepal UNDP office resulting in the discharge of the local Representative and five of his staff.

On 11 September 2000, a vacancy announcement was released advertising the Applicant's post.

On 16 November 2000, the Applicant requested that his case be referred to the AHDC, contending that his separation from service was a disciplinary measure which could not legally be imposed without prior submission of the case to a disciplinary committee. The AHDC submitted its report on 23 November 2000. The Applicant was found guilty of "Signing minutes and notes to the file for the Contracts Committee meetings and events which did not take place". All other charges were dismissed. The AHDC concluded that the Applicant was "not guilty of misconduct, but rather of unsatisfactory conduct", and, consequently, recommended that the decision to separate the Applicant from service be rescinded, and that instead, he be demoted from GS-7 to GS-6 for a two year duration.

On 21 December 2000, Administrator, UNDP, transmitted a copy of the report to the Applicant and informed him that he had decided to accept the unanimous recommendation of the AHDC, and to reinstate the Applicant as of 15 August 2000, on which date he would be demoted by one grade for a two-year duration.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant contends the following:

1. The Respondent erred in not referring his case to a disciplinary committee prior to the imposition of disciplinary sanctions.

2. The charge upon which the Applicant was ultimately convicted related to performance and was not the proper basis for a disciplinary sanction.

Whereas the Respondent's principal contentions are:

1. The decision to demote the Applicant for failing to meet the requisite standards of integrity was a valid exercise of the Secretary-General's discretionary authority.

2. The Applicant was accorded due process. The contested decision was in no way vitiated by substantive or procedural irregularity.

3. The decision was not vitiated by bias, improper motivation, or other extraneous factors.

4. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated on 25 July 2003 in Geneva and from 22 October to 21 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to rescind the recommendation of the AHDC, accepted by the Respondent, to demote him from the G-7 to the G-6 level. Claiming that he was treated in an arbitrary and discriminatory manner and denied due process, he demands compensation of one year net base salary, as well as an additional amount for damage to his reputation. He asserts that since he was charged only with unsatisfactory conduct, he cannot be disciplined for misconduct.

II. The OAPR stated in its report that acts committed by the Applicant amounted to unsatisfactory conduct and recommended that disciplinary action be initiated against him. Although the Applicant was exonerated from the charge of misconduct on the bribery charge, which was withdrawn, he was nevertheless separated from service in accordance with staff rule 109.3(vii), for unsatisfactory conduct. Subsequently, the AHDC dismissed charges A, B and C against the Applicant, which were, respectively, (a) his alleged failure to ensure compliance with procurement rules and procedures, (b) allowing the award of irregular contracts and (c) failing to adequately exercise authority and control over subordinate staff. The AHDC did find him guilty of signing minutes and notes to the file of Contracts Committee meetings that apparently did not take place. The AHDC upheld the finding of unsatisfactory conduct; however, the AHDC recommended that the decision to separate the Applicant from service be rescinded and that instead he be

demoted from G-7 to G-6 for a two-year period. The Administrator, UNDP, accepted the recommendation of the AHDC.

III. In appealing to the Tribunal to rescind his demotion, the Applicant argues that the recommendation of the AHDC to demote him was a legal mistake, because the rules regarding unsatisfactory conduct do not permit such punishment. In his view, the charge of which he was found guilty was related to performance, and therefore the matter should have been resolved through the PAR process. The Applicant points to circular UNDP/ADM/98/6, which provides that "it is important that performance-related issues should be dealt with through the PAR process, unless issues of apparent misconduct clearly make the case at issue a disciplinary one to be dealt with as outlined in ADM/97/17".

The Applicant also argues that the Administration reduced the charge from serious misconduct, as the bribery charges were withdrawn, to a charge of unsatisfactory conduct. Under these circumstances, para.3.2 of circular UNDP/ADM/97/17, entitled "Exoneration of Misconduct", requires that a letter of warning or reprimand be included in the annual report of the Applicant. Instead, the Applicant had been separated from service in accordance with staff rule 110.3 (a) (vii), a disciplinary measure. Circular UNDP/ADM/98/6 makes it clear that issues related to performance should not be submitted to disciplinary committees:

> "It is worth noting that many cases which have been reported to the Legal Section as disciplinary cases or cases involving issues of accountability have in fact, after ensuring that due process was observed, and investigations and hearings were properly completed, proved to be cases relating to the performance and not to the staff members conduct. It is important that performance-related issues should be dealt with through PAR process, unless issues of apparent misconduct clearly make the case at issue a disciplinary one to be dealt with as outlined in ADM/97/17."

The Applicant added that his separation from service was not in accordance with staff rule 110.4(a) which provides that:

> "No staff members shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:
>
> (i) If referred to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General;

(ii) In respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service".

Based on the foregoing, the Applicant maintains that his separation is null and void because the Administration failed to comply with the aforesaid relevant articles of ADM/97/17 or the provisions of staff rule 110.3 (a) (vii).

IV. The Applicant further contends that his separation is null and void, since the Administration separated him from service, prior to submission of his case to the AHDC, as required by staff rule 110.4(b), maintaining that until the AHDC issues its recommendation, the decision to separate him from service has no validity. The Tribunal agrees that the Respondent's presumptuous conduct in dismissing the Applicant without awaiting the recommendation of the AHDC is denigrating and contemptuous, both to the Applicant and to the AHDC. Such action is clearly a violation of the Administration's own rules and constitutes a clear denial of the Applicant's due process rights. Therefore, the Tribunal recommends that the Applicant be compensated accordingly.

V. Under staff regulation 10.2, the Secretary-General may impose disciplinary measures on staff members whose conduct is "unsatisfactory". The choice of the disciplinary measure to be imposed falls within Secretary-General's disciplinary power. The Tribunal will only intervene if the administrative action is "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact". (See Judgment No. 641, *Farid*, (1994), para. IV.) Thus, as unsatisfactory conduct may subject staff members to disciplinary action and may warrant the imposition of a disciplinary penalty, the Applicant's contention that his behavior was merely unsatisfactory, not warranting the imposition of a penalty, is without basis. (See Judgements No. 424 *Ying* (1988); and, No. 425, *Bruzual* (1988).)

VI. The Applicant submits as his excuse for signing minutes and notes of meetings and events which did not take place that these minutes were not prepared by him and were, in fact, prepared by the Administrative Assistant under instruction and guidance of the Representative and were routed to other members of the Committee for signature. In such circumstances, he argues that it was difficult for him not to sign the minutes, because the Representative threatened him that if he did not sign, the Representative would give him poor ratings in his performance report.

The Tribunal does not accept this justification set forth by the Applicant, with respect to the fraudulent signing of the minutes. The Tribunal notes that the Applicant joined his colleagues in signing a letter of 8 October 1999, reporting procurement irregularities committed by the Representative of UNFPA, which confirmed that he was not in fear of reprisal. In this regard the Tribunal notes that the Respondent contends that the absence of any credible reason as to why the Applicant did not report such wrongdoing earlier appears to confirm that the letter was a device used by the Applicant to avoid blame for his own misbehaviour. The Tribunal, however, did note the mitigating factors in the AHDC report, such as the Applicant's previous record of competence and good behaviour over a period of 25 years of service with UNFPA. Therefore, the Tribunal concurs with the unanimous recommendation of the AHDC, accepted by the Respondent, to rescind the decision of separation from service and, instead, demote the Applicant from the G-7 to the G-6 level.

VII. The Tribunal now turns to the alleged violation of due process created when the Respondent advertised the Applicant's post before the AHDC had decided the case. By doing this, the Applicant was placed in the position of being found guilty before having the opportunity to be heard. This was clearly a violation of the Applicant's due process rights, for it put the "hanging before the conviction". This created the appearance, if not the fact, that the AHDC's finding of guilty was a foregone conclusion, improperly influenced by the Respondent's premature condemnation of the Applicant and that the AHDC's decision was merely a rubber stamp on the Respondent's determination that the Applicant was guilty of misconduct and/or unsatisfactory conduct.

VIII. As a further demonstration of the Administration's utter and callous disregard of the Applicant's due process rights, a press report appeared in the Kathmandu Post of 27 August 2000, referring to the action taken by UNFPA to separate the former UNFPA Representative and four staff members in Nepal. The press report also stated that one additional staff member remained under active review. The Respondent submits that the Applicant was in no way identified in the newspaper article relating to the audit and its findings and that only the Representative was identified by title, but the Applicant claims that it was easy to identify him as the staff member under active review, and that this damaged his reputation. The Tribunal finds justification in the Applicant's complaint and decides that he is entitled to compensation in this regard.

IX. In view of the foregoing, the Tribunal:

1. Order the Respondent to pay the Applicant $6000 as compensation; and,

2. Rejects all other pleas.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 21 November 2003

Maritza **Struyvenberg**
Executive Secretary